



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**JOHN BEN SHEPPERD
ATTORNEY GENERAL**

November 12, 1954

Hon. Joseph C. Ternus
County Attorney
San Patricio County
Sinton, Texas

Opinion No. MS-160

Re: Effect of omission of the
name of a candidate for
justice of the peace from
the general election ballot.

Dear Mr. Ternus:

Your request for an opinion reads substantially as follows:

"Due to mistake the Republican candidate for Justice of the Peace of Precinct No. 4 in this county was left off the general election ballot. The Commissioners' Court is contemplating ordering a special general election with only the Democrat and Republican nominees for Justice of the Peace on the ballot and holding the November 2nd election as to Justice of the Peace only to be invalid. Please advise if this special general election would be valid."

The following questions are presented by your request:

(1) Does the omission of the name of a properly certified candidate for an office invalidate the election as to that office?

(2) If so, may the board which canvasses the results of the election declare the election void or must the invalidity be adjudicated through a court proceeding?

(3) Should another election be ordered to take the place of the invalid election?

(4) Are the names appearing on the ballot at the new election limited to the candidates whose names should have appeared on the general election ballot?

We have been unable to find anything in the statutes or decided cases of this State expressly dealing with the effect of the omission of the name of a candidate from the ballot, but the rule announced in other States is that the omission of the name of a qualified opposing candidate invalidates the election. State ex rel. Rice v. Dillon, 197 Miss. 504, 19 So. 2d 918 (1944); Morrison v. Crews, 192 Tenn. 20, 237 S.W. 2d 1 (1951). It is our opinion that the same rule should be applied in this State. We are not expressing an opinion on whether the candidate whose name was omitted might not be estopped from complaining of the omission under some circumstances.

For example, if his name was omitted from the list of nominees published or posted by the county clerk in accordance with Article 13.29, Vernon's Election Code, and he knew of the omission and failed to attempt to have the error corrected before the ballots were printed, he might possibly be precluded from questioning the validity of the election. The facts which you have stated do not indicate that any such circumstances existed in this instance.

The canvassing of the returns of an election is a ministerial act. Ferguson v. Huggins, 122 Tex. 95, 52 S.W.2d 904 (1932). The canvassing board has no authority to pass on the validity or legality of votes cast at the election or to determine disputed fact issues. These are matters which may be determined only by a court. But the ministerial officer does have power to review official records and ascertain defects that are shown upon the face of the records. Weatherly v. Fulgham, decided by the Supreme Court of Texas on October 6, 1954 (not yet reported). It is our opinion that the commissioners' court may ascertain from an examination of the certificates of nomination filed with the county clerk that the official ballot was defective for failure to include the name of a properly certified candidate and may refuse to canvass the votes for that office on the ground that the election was void as to that race. State ex rel. Rice v. Dillon, supra. We are not passing on the question of whether the omitted candidate in this instance had been properly certified to the county clerk, as we do not have all the facts relating to the certification.

Turning to the third question, the Election Code provides for the calling of a new election where an election is declared void for various reasons. Arts. 4.08 and 9.15, Vernon's Election Code. It is our opinion that a new election for this office should be called in the event the election held on November 2nd is declared void.

The last question concerns the names to be placed on the ballot at the new election. The election should be held in the same manner as the general election. Arts. 4.08 and 9.15, supra. Attorney General's Opinion O-5807 (1944) held that in an election for school trustee called under Article 4.08 to determine a tie, persons other than the two candidates who tied are at liberty to enter the election, provided they comply with the applicable provisions of the law relative to the filing of their candidacies. Under the law applicable to the ballots in that election, a person desiring to become a candidate for school trustee could do so by filing a request at least ten days before the election. The ballot in a general election for justice of the peace is regulated by Article 6.01,

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Vernon's Election Code, which provides that "no name shall appear on the official ballot except that of a candidate who was actually nominated (either as a party nominee or as a non-partisan or independent candidate) in accordance with the provisions of this code." Under this statute, there seems to be no way in which any person could qualify for a place on the ballot other than those who had already been nominated.

It seems reasonable that the names on the ballot at the new election should be limited to those which should have appeared on the general election ballot where a new election is ordered because of a defect in the original ballot. It is in effect the same election, which is being held a second time because of the error in the way it was held the first time. There is a rational basis for a different rule where the general election ballot was correctly made up but the election resulted in a tie. Without deciding what the effect of a tie vote would be on the ballots at the new election, it is our opinion that the names on the ballot at this election must be confined to the candidates who had qualified to have their names placed on the general election ballot.

Yours very truly,

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By
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